

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL D. CAMPBELL,

Defendant-Appellant.

UNPUBLISHED

November 20, 2008

No. 280424

Wayne Circuit Court

LC No. 06-013858-01

Before: Murphy, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of criminal sexual conduct in the second degree (CSC II), MCL 750.520(c); criminal sexual conduct in the third degree (CSC III), MCL 750.520(d); kidnapping, MCL 750.349; assault with intent to do great bodily harm less than murder, MCL 750.84; and assault and battery, MCL 750.81. Defendant was sentenced to concurrent terms of ten to 15 years for CSC and kidnapping, and six to ten years for the assault with intent to do great bodily harm less than murder. The assault and battery conviction was dismissed. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that he received ineffective assistance of counsel because his attorney allegedly failed to obtain complainant's mental health records and failed to get a psychological expert to impeach complainant's testimony. Complainant acknowledged that he had not taken his medications for at least three days before the crime. Defendant asserts that an expert would have discredited complainant by addressing the effects of this action and by establishing that the complainant's disorganized and inconsistent recollection of the events was indicative of his mental illness. He asserts that the CSC and kidnapping charges were based on complainant's perception of events, and that his perception mattered since defendant claimed that complainant consented to sex and was not being held against his will. We disagree.

Our review is limited to the existing record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). To succeed on this claim, defendant must show that trial counsel's performance fell below an objective standard of reasonableness and that, but for the errors, there would have been a reasonable probability of a different outcome. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999). Defendant must overcome the presumption that his counsel's assistance was based on sound trial strategy. *Id.*

The existing record does not support the supposition that a psychological expert or an in-depth examination of the mental health records would have been helpful to defendant's case. It was established that complainant was schizophrenic and had not taken his medications but had smoked marijuana for three days, and had smoked marijuana laced with crack cocaine on the day in question. Complainant admitted that without his medications he had auditory hallucinations and did not sleep. There is nothing to suggest that more authoritative impeachment by an expert would have been of significant value. Moreover, counsel could have determined that the impeachment value of the existing evidence was sufficiently solid, and that calling an expert could have compromised its value. Defendant has not overcome the presumption that counsel had a sound trial strategy. *Rice, supra*.

Defendant next argues that the prosecutor improperly referred to evidence outside the record to bolster complainant's credibility and also improperly appealed to the jury to sympathize with complainant. We find no merit in this argument

Our review is for outcome-determinative plain error unless defendant contemporaneously and specifically objected, such that a curative instruction could have been given, unless the error could not have been cured. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). If not preserved, reversal is warranted only when plain error resulted in the conviction of an innocent person, or seriously affected the fairness, integrity, or public reputation of the proceedings. *People v Unger*, 278 Mich App 210, 235; 749 NW 2d 272 (2008).

A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *Id.* The prosecutor argued that complainant was terrified when he did not flee, that people don't know what they would do in such a situation, and that "[y]ou don't know psychologically what is happening inside another person." In this context, the prosecutor referenced well-known cases in which captives stayed with their captors for extended periods despite having chances to flee. Defendant asserts that the prosecutor was describing the "Stockholm Syndrome" even though the syndrome had not been introduced into evidence by any expert. However, in context, the prosecutor was arguing that captives do not always run when given the opportunity; she was not arguing that the "Stockholm Syndrome" applied to defendant. To the extent there was ambiguity, a curative instruction could have offered clarification. There was no objection or request for such an instruction and accordingly, review is for outcome-determinative plain error. Two witnesses, including defendant's friend, substantiated complainant's testimony that he was being held against his will. It appears that a recorded telephone conversation between a police informant and defendant also buttressed complainant's claims. Under these circumstances, defendant has not shown any reasonable probability of a different outcome.

Defendant also argues that the prosecutor impermissibly told the jury, without basis in expert testimony, that consistent testimony from the mentally ill complainant would require hours and "pinpoint" questioning. However, this remark was a reasonable inference based on inconsistencies in complainant's testimony and his mental illness, and therefore did not constitute prosecutorial misconduct. See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Defendant argues that the prosecutor also interjected as fact arguments that rape is about power and control, and that the behavior of building someone up and then breaking him down is consistent with sociopathic behavior. The prosecutor pointed to supporting evidence, and made these comments in the context of arguing that the evidence did not support a finding of consent.

There was no objection or request for a curative instruction, and defendant must therefore establish plain error. There is no reasonable probability that the jury would have reached a different conclusion on consent given the testimony of the other witnesses and the tape.

Defendant next argues that the prosecutor, without reference to evidence, pointed out that the size of defendant's penis and complainant's anus were unknown in an effort to explain the absence of anal injury. In closing argument, defense counsel suggested that the absence of anal tearing supported a finding of consent. This argument was not misconduct; it was responsive to a matter raised by defendant and proportionate in its response. See *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003).

Next, defendant asserts that the prosecutor made civic duty arguments, which are prohibited. See *Bahoda, supra* at 282-283. Defendant notes the prosecutor's remark intimating that she knew a jury would not convict based on complainant's testimony alone given his mental health. She was acknowledging inconsistencies in complainant's statements, and expressed thanks that the police had garnered so much corroborating evidence. In essence, the prosecutor was admitting that complainant, because of his mental illness, had credibility issues, but was asserting that the corroborating evidence supported a finding that he was credible. Credibility was an issue in the case and was not an issue that was "broader than guilt or innocence." *Id.* at 284.

The prosecutor subsequently asked the jury to consider all the evidence and, in essence, asked the jury to give complainant justice. We conclude that the prosecutor was, in essence, arguing that the evidence supported a finding of guilt and a determination that the jury should find complainant credible. However, even if this comment were interpreted as a request to sympathize with a vulnerable victim, we conclude that any error would be harmless. MCR 2.613(A); *People v Mateo*, 453 Mich 203, 210, 212; 551 NW2d 891 (1996). For the reasons previously discussed, we conclude that this comment would not have affected the outcome of the proceedings.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Michael R. Smolenski